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### The (Hot) Dog Days of Summer: Missouri's "Baseball Rule" Takes a Strike

Ross H. Freeman

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## NOTE

### The (Hot) Dog Days of Summer: Missouri's “Baseball Rule” Takes a Strike

*Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184 (Mo. 2014)  
(en banc).

ROSS H. FREEMAN\*

#### I. INTRODUCTION

In 2014, over 73 million Americans attended Major League Baseball (“MLB”) games.<sup>1</sup> That averages to around 30,458 fans per game.<sup>2</sup> In baseball, a sport where a 100 M.P.H. pitch can result in a screaming foul ball into the stands, there are surprisingly few lawsuits that are successfully brought against MLB teams. This is not because there are no injuries,<sup>3</sup> but because of the so-called “baseball rule” and the protections that it provides MLB teams.<sup>4</sup> The baseball rule can be summarized as an application of primary implied assumption of risk – a defense to negligence that limits the liability of a ball-park owner by eliminating a duty owed to the spectators, as long as the spectators in the most dangerous seats (in terms of inherent risks of the sport of baseball) are protected by fencing or netting.<sup>5</sup>

In 2014, the Supreme Court of Missouri declined to extend liability protection to the Kansas City Royals to cover the antics of the team’s mascot.<sup>6</sup> On September 8, 2009, John Coomer was hit in the eye by a hotdog errantly

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\* B.S., Southeast Missouri State University, 2013; J.D. Candidate, University of Missouri School of Law, 2016. I would like to sincerely thank Professor Joshua Hawley for all of his help with this Note. I would also like to thank the entire staff of the *Missouri Law Review*. Finally, I would like to thank my family, friends, and loved ones for their endless love and support.

1. *MLB Records Seventh Best Attendance Total Ever in 2014*, MLB (Sept. 29, 2014), <http://m.mlb.com/news/article/96990912/mlb-records-seventh-best-attendance-total-ever-in-2014>.

2. *Id.*

3. See David Glovin, *Baseball Caught Looking as Fouls Injure 1,750 Fans a Year*, BLOOMBERG (Sept. 9, 2014, 3:05 PM), <http://www.bloomberg.com/news/2014-09-09/baseball-caught-looking-as-fouls-injure-1-750-fans-a-year.html>.

4. *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 194-96 (Mo. 2014) (en banc) (citing *Hudson v. Kan. City Baseball Club*, 164 S.W.2d 318, 320 (Mo. 1942)).

5. *Id.* at 194-98.

6. *Id.* at 188 (“This Court holds that the risk of being injured by Sluggerrr’s hotdog toss is not one of the inherent risks of watching a Royals home game.”).

thrown by the Kansas City Royals' mascot, Sluggerrr.<sup>7</sup> Following a trial court verdict for the Kansas City Royals, the Missouri Court of Appeals for the Western District reversed the trial court's ruling.<sup>8</sup> On transfer to the Supreme Court of Missouri, the Supreme Court of Missouri affirmed the Missouri Court of Appeals for the Western District, which had reversed the trial court's verdict for the Royals.<sup>9</sup>

Part II of this Note provides the facts and holding of *Coomer*. Part III discusses the legal background of *Coomer*, including the adoption of comparative negligence in Missouri, Missouri's baseball rule, and other persuasive baseball rule authority the court used in *Coomer*. Part IV analyzes the court's application of the law to the specific facts in *Coomer*. Finally, Part V discusses the court's decision and explains why the court should have adopted a broader definition of what constitutes an "inherent risk" of attending an MLB game in person.

## II. FACTS AND HOLDING

John Coomer was an ardent Kansas City Royals fan.<sup>10</sup> Coomer estimated he had been to 175 Royals home games before attending the game on September 8, 2009.<sup>11</sup> Coomer also admitted that he frequently watched Sluggerrr's hotdog launch between innings.<sup>12</sup> On September 8, 2009, Coomer and his father attended the Kansas City Royals baseball game against the Detroit Tigers.<sup>13</sup> There was a smaller attendance than usual, so the Coomers chose to leave their seats to move to empty seats six rows behind the Tigers' dugout.<sup>14</sup> Shortly after the Coomers arrived at their new seats, Sluggerrr, the Royals' mascot, started the "hotdog launch," which has been a feature of every Royals home game since 2000.<sup>15</sup>

The hotdog launch consists of placing hotdogs, wrapped in bubble wrap, into an air gun and then shooting the hotdogs to eager fans who are rows away.<sup>16</sup> While the air gun is being reloaded, Sluggerrr generally hand-tosses

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7. *Id.* at 188-89. For an example of Sluggerrr using a hotdog cannon, see supermovieron, *Hot Dog Launch in Slo-Mo*, YOUTUBE (May 16, 2009), <https://www.youtube.com/watch?v=XgtiGVahxjU>.

8. *Coomer v. Kan. City Royals Baseball Corp.*, Nos. WD 73984, WD 74040, 2013 WL 150838, at \*3 (Mo. Ct. App. 2013), *transferred*, 437 S.W.3d 184 (Mo. 2014) (en banc).

9. *Coomer*, 437 S.W.3d at 188.

10. *Id.* at 188.

11. *Id.* at 189.

12. *Id.*

13. *Id.* at 188.

14. *Id.*

15. *Id.*

16. *Coomer v. Kan. City Royals Baseball Corp.*, Nos. WD 73984, WD 74040, 2013 WL 150838, at \*1 (Mo. Ct. App. 2013), *transferred*, 437 S.W.3d 184 (Mo. 2014) (en banc).

hotdogs, wrapped in foil, to fans within throwing distance.<sup>17</sup> Sluggerrr uses multiple tossing motions, including behind-the-back tosses to lucky fans.<sup>18</sup>

On this specific occurrence of the hotdog launch, Coomer was within throwing distance of Sluggerrr.<sup>19</sup> Coomer testified that many fans around him were cheering and yelling for Sluggerrr to toss them a succulent sausage.<sup>20</sup> Coomer saw Sluggerrr turn his back and make a motion with his arm behind his back, signaling a likely behind-the-back-throw, but then briefly looked away to the scoreboard.<sup>21</sup> During that brief moment, Sluggerrr had tossed a hotdog to Coomer, or to his general area, that squarely hit Coomer in the face, knocking off his hat.<sup>22</sup> The velocity of the throw made Coomer believe that it was an overhand throw, rather than the gentler underhand throws that Sluggerrr had allegedly used that day.<sup>23</sup> Showing his dedication, Coomer stayed for the remainder of the game and even attended the next night's game.<sup>24</sup>

Two days later, he started to believe something “wasn’t right” with his right eye.<sup>25</sup> Eight days after the incident, Coomer went to a doctor and was diagnosed with a detached retina that required several surgeries to repair.<sup>26</sup> Coomer was also diagnosed with a traumatic cataract in the same eye, which also required surgery to repair.<sup>27</sup> Coomer gave the Royals notice of the injury on the same day he visited the doctor and eventually filed suit against the Royals in February 2010 in the Jackson County Circuit Court, alleging battery and negligence.<sup>28</sup>

In his initial suit, Coomer contended that the Royals “failed to exercise ordinary care through its agents, and failed to adequately train and supervise its agents.”<sup>29</sup> The Royals’ answer asserted the defenses of implied primary and secondary assumption of the risk.<sup>30</sup> At the close of Coomer’s evidence at trial, the Royals admitted that the employee portraying Sluggerrr “was its agent, servant, and/or employee and that he was acting in the scope and

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17. *Id.*

18. *Id.* (mentioning that Sluggerrr’s tossing methods included “overhand, over the shoulder, behind the back . . . [and] sidearm”).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 189 (Mo. 2014) (en banc).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Coomer v. Kan. City Royals Baseball Corp.*, Nos. WD 73984, WD 74040, 2013 WL 150838, at \*1 (Mo. Ct. App. 2013), *transferred*, 437 S.W.3d 184 (Mo. 2014) (en banc).

30. *Id.*

course of his employment.”<sup>31</sup> Coomer then moved for a directed verdict as to the Royals’ defenses, which the trial court denied.<sup>32</sup> The court also denied several of Coomer’s objections pertaining to jury instructions.<sup>33</sup> The jury returned a verdict in favor of the Royals, placing 0% of the fault on the Royals and 100% of the fault on Coomer.<sup>34</sup> From the denial of his motion for a new trial, Coomer appealed the trial court’s decision.<sup>35</sup>

On appeal, Coomer claimed instructional error as well as error by the trial court in denying his directed verdict as to the Royals’ defenses.<sup>36</sup> Coomer argued four points before the Court of Appeals for the Western District.<sup>37</sup> First, he argued that the trial court erred in its jury instruction on the Royals’ defense of primary implied assumption of risk.<sup>38</sup> His second argument was that “even if primary implied assumption of risk was available to the Royals as a defense, the trial court erred because as submitted to the jury, the instruction was an incorrect statement of law.”<sup>39</sup> Third, he argued that the trial court erred in “permitting and instructing the jury on the Royals’ defense of comparative fault (secondary implied assumption of risk).”<sup>40</sup> Finally, Coomer contended that the “trial court erred in refusing to instruct the jury on his claims for negligent supervision and training.”<sup>41</sup>

As to Coomer’s first point, that a mascot throwing hotdogs at fans is not an inherent or unavoidable risk of playing baseball, the appellate court reversed the trial court, finding that the trial court erred in instructing the jury on implied assumption of risk.<sup>42</sup> The appellate court explained that inherent risks of an activity are “perfectly obvious or fully comprehended” and represent dangers that are “known and appreciated.”<sup>43</sup> The instruction to the jury, concerning whether a hotdog thrown by a mascot was an inherent risk of watching a Royals home game, was in error because that is a question for the court, not for the jury.<sup>44</sup> Coomer’s second point was rendered moot, and the appellate court declared that the trial court did not err in Coomer’s third and

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31. *Id.* at \*2.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at \*3 (“Inherent risks are those that inure in the nature of the sport itself.”) (citing *Sheppard ex rel. Wilson v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 262-63 (Mo. Ct. App. 1995)).

43. *Id.* (citing *Martin v. Buzan*, 857 S.W.2d 366, 368-69 (Mo. Ct. App. 1993)).

44. *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 188 (Mo. 2014) (en banc).

fourth points.<sup>45</sup> The comparative fault jury instruction (point three) and the negligent supervision and training instruction (point four) are not included in this Note, as the Court of Appeals ruled the trial court did not err in these specific instructions.<sup>46</sup>

The case was then transferred to the Supreme Court of Missouri.<sup>47</sup> That court held, as a matter of law, that “the risk of being injured by Sluggerrr’s hotdog toss is not one of the inherent risks of watching a Royals home game.”<sup>48</sup> The court focused on the fact that baseball can be played without tossing hotdogs to fans, stating that “[t]he risk of being injured by Sluggerrr’s hotdog toss . . . is not an unavoidable part of watching the Royals play baseball.”<sup>49</sup> The court went on to say that the risk of being hit by a hotdog thrown by a mascot is no more inherent in watching a game of baseball than it is inherent in “watching a rock concert, a monster truck rally, or any other assemblage where free food or T-shirts are tossed into the crowd to increase excitement and boost attendance.”<sup>50</sup>

The court, in deciding to vacate the judgment for the Royals, determined that Coomer’s claim was not barred by the assumption of risk doctrine and that it was up to the jury to decide (1) whether Sluggerrr injured Coomer with the thrown hotdog and (2) whether Sluggerrr was negligent in doing so.<sup>51</sup>

As discussed below, the “baseball rule” is an application of the implied primary assumption of risk doctrine, specialized for the MLB and other sporting events.<sup>52</sup> The court, in vacating the judgment for the Royals, declined to extend the protection of the baseball rule to other events within the stadium, such as antics by a mascot.<sup>53</sup> Thus, the court further narrowed the baseball rule to only cover risks of injury that are inherent dangers of watching the sport of baseball in person.<sup>54</sup> The Supreme Court of Missouri, in vacating the judgment for the Royals and remanding the case for further proceedings, held: (1) that the question of whether being hit by a thrown hotdog is an inherent risk of attending a baseball game was a decision for the court and not the jury, (2) that being hit by a hotdog is not an inherent risk of attending a baseball game, (3) that the jury instructions requiring the jury to determine if it was an inherent risk were prejudicial towards Coomer, and (4) that the issue of comparative fault was a question for the jury.<sup>55</sup> When a team’s mascot

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45. *Coomer*, 2013 WL 150838, at \*4-5.

46. *Id.*

47. *Coomer*, 437 S.W.3d 184.

48. *Id.* at 188.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 194 (“One of the most interesting – and certainly the most relevant – applications of implied primary assumption of risk involves certain risks assumed by spectators at sporting events.”).

53. *Id.* at 200-01.

54. *Id.* at 199.

55. *Id.* at 188.

injures a spectator at a baseball game, the baseball rule does not preclude damages for the fan's injury if the team's mascot acted negligently.<sup>56</sup>

### III. LEGAL BACKGROUND

#### A. Comparative Fault in Missouri: *Gustafson v. Benda*

In 1983, the Supreme Court of Missouri adopted the comparative fault doctrine in *Gustafson v. Benda*.<sup>57</sup> The specific facts of that case are not relevant to this Note. Before proceeding to apply the baseball rule in *Coomer*, the court had to determine which contributory negligence defenses survived Missouri's adoption of the comparative fault doctrine.<sup>58</sup>

#### B. Missouri's Baseball Rule

The baseball rule is an application of the assumption of risk doctrine, which is a defense to the tort of negligence.<sup>59</sup> To establish a claim of negligence in Missouri, a claimant is required to show that (1) the defendant had a duty to conform to a standard of conduct to protect the claimant from unreasonable risks, (2) that duty was breached, (3) the breach of duty proximately caused the claimant's injury, and (4) the claimant suffered damages.<sup>60</sup> Defining assumption of risk, the court stated that "if a person voluntarily consents to accept the danger of a known and appreciated risk, that person may not sue another for failing to protect him from it."<sup>61</sup> The defense of primary implied assumption of risk, when successful, negates the existence of the duty element of negligence.<sup>62</sup> Since the defendant has no duty to protect a claimant from the inherent risks of an activity in which the claimant voluntarily participated, the defendant cannot be held liable under the tort of negligence.<sup>63</sup>

Before proceeding to the baseball rule, it is important to differentiate between the different variations of the assumption of risk doctrine. The express

56. *Id.*

57. 661 S.W.2d 11, 15 (Mo. 1983) (en banc) ("[T]his and future cases shall apply the doctrine of pure comparative fault in accordance with the Uniform Comparative Fault Act [Sections] 1-6.").

58. See *infra* notes 123-32 and accompanying text.

59. Matthew J. Ludden, Recent Development, *Take Me Out to the Ballgame . . . But Bring a Helmet: Reforming the "Baseball Rule" In Light of Recent Fan Injuries at Baseball Stadiums*, 24 MARQ. SPORTS L. REV. 123, 127 (2013).

60. *Coomer v. Kan. City Royals Baseball Corp.*, Nos. WD 73984, WD 74040, 2013 WL 150838, at \*2 (Mo. Ct. App. 2013), *transferred*, 437 S.W.3d 184 (Mo. 2014) (en banc).

61. *Coomer*, 437 S.W.3d at 191 (citing *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982) (en banc)).

62. *Coomer*, 2013 WL 150838, at \*3 (citing *Ivey v. Nicholson-McBride*, 336 S.W.3d 155, 157-58 (Mo. Ct. App. 2011)).

63. *Id.*

assumption of risk doctrine states that “when a plaintiff makes an express statement that he is voluntarily accepting a specified risk, the plaintiff is barred from recovering damages for an injury resulting from that risk.”<sup>64</sup> Implied assumption of risk exists where, even though a plaintiff does not expressly accept a specified risk through a waiver or in a verbal acquiescence, that plaintiff still impliedly assumes the risk through his or her conduct and the surrounding circumstances.<sup>65</sup> Implied primary assumption of risk is defined as a risk that arises from the circumstances or a risk that is inherent in an activity or on a property.<sup>66</sup> Implied secondary assumption of risk is defined as a risk that is created by the defendant’s negligence.<sup>67</sup> The baseball rule is an application of the primary implied assumption of risk doctrine.<sup>68</sup>

Missouri first recognized that there were inherent dangers in attending baseball games for spectators over 100 years ago in *Crane v. Kansas City Baseball & Exhibition Co.*<sup>69</sup> In *Crane*, the defendants were owners of a baseball park and the plaintiff was a spectator at the defendants’ park.<sup>70</sup> Certain seats at the defendants’ park were “safe” in that there was mesh fencing to protect spectators from foul balls, while other seats did not have a mesh fence between them and the ball field.<sup>71</sup> The plaintiff, who was not sitting in one of the “safe” seats, was injured by a foul ball and sued, claiming that the defendants were negligent in not screening all of the seats from foul balls.<sup>72</sup> The court did not go so far as to say that the defendants had no duty to spectators at their park whatsoever, but instead stated that the defendants “were bound to exercise reasonable care, i.e., care commensurate to the circumstances of the situation, to protect their patrons against injury.”<sup>73</sup> The court held that the defendants had exercised reasonable care by providing seating that was “safe” from foul balls and that the defendants had the opportunity to sit in those seats.<sup>74</sup>

It was important to the baseball rule analysis in *Crane* that the plaintiff had chosen to sit in the seat he did, likely because there was no fence obstructing his view of the game.<sup>75</sup> By sitting in the unprotected seat, he assumed the risk of his specific position in the stadium.<sup>76</sup> As the plaintiff chose the more dangerous of the two types of seats, with full knowledge of the dan-

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64. *Coomer*, 437 S.W.3d at 191.

65. *Id.* at 192.

66. *Id.*

67. *Id.*

68. *See supra* note 59 and accompanying text.

69. 153 S.W. 1076, 1077 (Mo. Ct. App. 1913).

70. *Id.*

71. *Id.* at 1077-78.

72. *Id.* at 1077.

73. *Id.* (internal citation omitted).

74. *Id.* at 1078.

75. *Id.* (finding that the plaintiff’s change of seat was “doubtless for the purpose of avoiding the annoyance of the slight obstruction to vision offered by the netting”).

76. *Id.*



gers of being a spectator in a baseball park, he did not exercise reasonable care, barring his recovery under the contributory negligence doctrine.<sup>77</sup>

The second major baseball rule case in Missouri was *Edling v. Kansas City Baseball & Exhibition Co.*, decided one year later in 1914.<sup>78</sup> As with *Crane*, the plaintiff in this case was a spectator at the defendant's baseball park.<sup>79</sup> Unlike *Crane*, however, this plaintiff chose to sit in the "safe" seats in the grandstand, rather than the unprotected seats the plaintiff in *Crane* sat in.<sup>80</sup> A foul ball went off a bat and proceeded through a large hole in the mesh fencing, hitting the plaintiff in the face and breaking his nose.<sup>81</sup> The plaintiff sued the defendant for negligence, alleging that the "defendants negligently and carelessly permitted the screening on said grand stand to . . . become old, rotten, worn, and defective, and negligently and carelessly permitted holes large enough to permit the passage of a baseball to . . . remain in said screening in said grand stand."<sup>82</sup> The plaintiff also alleged that the defendants knew of the dangerous condition of the screening and failed to fix the screening prior to the accident.<sup>83</sup> The court determined that the defendant did not meet its duty of care because it did not exercise reasonable care to protect its spectators in the grandstand seating by maintaining the mesh fencing that protected those spectators from foul balls.<sup>84</sup>

The third major baseball rule case in Missouri came in 1942 with *Hudson v. Kansas City Baseball Club*.<sup>85</sup> Mr. Hudson, the plaintiff, intended on sitting in a seat that was protected behind the wire netting and had presumed he was sitting in a seat that was protected from foul balls.<sup>86</sup> However, Mr. Hudson was mistaken and was subsequently hit in the face with a foul ball.<sup>87</sup> Hudson sued, claiming that the defendant "disregarded its obligation of furnishing a fee paying spectator reasonable protection from injury while attending a baseball game," that the defendant's premises were not safe, and that the defendant "failed to fulfill its duty 'to erect some protection across a line running from home plate to any seat in the grandstand to which the public [was] invited and which [was] within ordinary reach of a foul ball.'"<sup>88</sup>

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77. *Id.* Note that in *Crane*, the contributory negligence doctrine was still the law in Missouri, as compared to the comparative negligence doctrine adopted in *Gustafson* in 1983 and applied in *Coomer*. See *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (en banc).

78. 168 S.W. 908 (Mo. Ct. App. 1914).

79. *Id.* at 908.

80. *Id.* at 909.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 910.

85. 164 S.W.2d 318 (Mo. 1942).

86. *Id.* at 319.

87. *Id.*

88. *Id.*

The court, in ruling for the defendant, stated that part of the attraction of attending a baseball game is the thrill of catching a foul ball and that “[o]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist.”<sup>89</sup> The court held that “[i]n baseball the patron participates in the sport as a spectator only, but in so doing subjects himself to the dangers necessarily and usually incident to and inherent in the game.”<sup>90</sup> One does not assume the risk of being injured by the stadium owner’s negligence, but “by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game.”<sup>91</sup>

In making its decision, the court noted that Mr. Hudson was a person with actual knowledge of the dangers of the game of baseball, that he had attended many games before, and that he would have noticed that he was not sitting in a seat protected by netting had he been looking.<sup>92</sup> The court determined that the position of the spectator in a seat where he knew that he might be hit by a foul ball was particularly important, as he “voluntarily elected to watch the game with full knowledge of the dangers incident to it and of the possibility of injury to himself.”<sup>93</sup>

Missouri’s contemporary baseball rule was concisely stated in 1950 in *Anderson v. Kansas City Baseball Club*:

[w]here a baseball game is being conducted under the customary and usual conditions prevailing in baseball parks, *it is not negligence to fail to protect all seats in the park by wire netting*, and that the special circumstances and specific negligence pleaded did not aid plaintiff or impose upon the defendant a duty to warn him against hazards which are necessarily incident to baseball and are perfectly obvious to a person in possession of his faculties.<sup>94</sup>

In *Anderson*, the plaintiff (“Mrs. Anderson”), an individual with no knowledge of the risks of attending a baseball game, was seated by the defendant’s employee in a seat unprotected by netting.<sup>95</sup> After being seated, Mrs. Anderson was hit with a foul ball.<sup>96</sup> She asserted negligence, claiming that the defendant knew of the dangers of baseball and did not warn her of those dangers or provide additional safeguards or protections for fans seated

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89. *Id.* at 323.

90. *Id.*

91. *Id.* (internal citation omitted).

92. *Id.* at 324.

93. *Id.* at 324-25.

94. *Anderson v. Kan. City Baseball Club*, 231 S.W.2d 170, 172 (Mo. 1950) (emphasis added).

95. *Id.* at 171 (finding that “plaintiff was wholly unaware and ignorant of such hazard”).

96. *Id.*

outside of the protected netted area.<sup>97</sup> Mrs. Anderson's second claim was that she was seated in a protected seat behind netting, that the defendant's employee moved her to an unprotected seat, and that the employee assured her that the unprotected seat was safe because "hundreds of people sat there every day."<sup>98</sup>

The court held that the duty to exercise ordinary care to provide spectators with a reasonably safe place to watch baseball was fulfilled when "those portions of the stands which are most frequently subject to the hazard of foul balls are screened and when screened seats are provided for as many as may reasonably be expected to desire to use them."<sup>99</sup> Even if this duty is fulfilled, a risk remains that those in unprotected seats may be injured, as the risk of being hit by a foul ball is a "necessary and inherent part of the game and remains after ordinary care has been exercised to provide the spectators with seats which are reasonably safe."<sup>100</sup> The court further stated that this risk is assumed by spectators as it remains after due care has been exercised by the park owner and is not a result of negligence by the park owner.<sup>101</sup> Because this risk is inherent in the game, and clearly not unreasonable, no duty to warn of the danger was required by the park owner or its employees.<sup>102</sup>

These cases show that the baseball rule protects baseball teams in that if a baseball team exercises reasonable care to protect spectators from the harm that follows the inherent risks of baseball, the baseball team will not be held liable for injuries to spectators.<sup>103</sup> However, a question remained in Missouri as to whether the baseball rule prevented liability for baseball teams for the actions of the team's mascot or other employees until *Coomer* was decided.

### C. Persuasive Baseball Rule Authority

The Supreme Court of Missouri relied heavily on *Lowe v. California League of Professional Baseball*<sup>104</sup> in making its decision in *Coomer*.<sup>105</sup> In *Lowe*, the Rancho Cucamonga Quakes' mascot repeatedly jostled and interfered with a spectator who was subsequently hit with a foul ball.<sup>106</sup> The mascot, a seven-foot-tall dinosaur, repeatedly hit the plaintiff with his tail for

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97. *Id.*

98. *Id.*

99. *Id.* at 173 (internal citations omitted).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. 65 Cal. Rptr. 2d 105 (Cal. Dist. Ct. App. 1997).

105. *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 198 (Mo. 2014) (en banc) ("One example, useful both for its facts and its analysis, is *Lowe v. California League of Professional Baseball*.").

106. *Lowe*, 65 Cal. Rptr. 2d at 106.

close to two whole minutes before the foul ball hit the plaintiff.<sup>107</sup> It was important to the *Lowe* court's determination of whether a mascot is an integral part of attending a baseball game in person that the individual who played the mascot in *Lowe* "recounted that there were occasional games played when he was not there."<sup>108</sup>

The *Lowe* court noted that a defendant has a duty to not *increase* the inherent risks spectators assume and are regularly exposed to at professional baseball games.<sup>109</sup> The *Lowe* court, in reversing a grant of summary judgment for the ballpark owner defendant, held that, as a matter of law, the risk of being injured by a mascot's antics was not an inherent risk of attending a baseball game and that it is up to a jury to decide if the mascot's actions increased the inherent risks to the plaintiff of attending the baseball game.<sup>110</sup>

#### IV. INSTANT DECISION

In the instant case, the Supreme Court of Missouri found that the baseball rule did not preclude damages for the alleged negligent acts of a team's mascot when the alleged negligent act was not an inherent risk of the sport of baseball.<sup>111</sup> The court held that as a matter of law the risk of being injured by a hotdog thrown by Sluggerrr was not an inherent risk of attending a Kansas City Royals baseball game.<sup>112</sup> The court relied on *Lowe v. California League of Professional Baseball* in determining that a mascot's antics are not considered to be an inevitable and unavoidable risk of playing the game of baseball.<sup>113</sup> The *Coomer* court focused on the *Lowe* court's analysis of what constitutes an inherent risk, which was defined as "some feature or aspect of the game which is inevitable or unavoidable in the actual playing of the game."<sup>114</sup> In addition to relying on the *Lowe* court's analysis of what an inherent risk is, the *Coomer* court looked to the Webster dictionary's definition of "inherent," finding it to be defined as "structural or involved in the constitution or essential character of something; belonging by nature or settled habit."<sup>115</sup>

The *Coomer* court held that, because being injured by a hotdog thrown by Sluggerrr was not an inherent risk of watching baseball in person, and because the Royals' negligence increased one of the inherent risks that injured Coomer as a result, a jury is entitled to hold the Royals negligent and

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107. *Id.* at 109 ("For a period of at least two minutes, Tremor whacked the back of Mr. Lowe's head; back and shoulder with the tail portion of the Tremor costume.").

108. *Id.* at 111. This was in contrast to Sluggerrr, a mascot who is a staple at every Kansas City Royals home game. *Coomer*, 437 S.W.3d at 188.

109. *Lowe*, 65 Cal. Rptr. 2d at 106.

110. *Id.* at 111.

111. *Coomer*, 437 S.W.3d at 188.

112. *Id.*

113. *Lowe*, 65 Cal. Rptr. 105.

114. *Coomer*, 437 S.W.3d at 198 (citing *Lowe*, 65 Cal. Rptr. 2d at 111).

115. *Id.* at 201 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1163 (1966)).

that the fault will be apportioned under the traditional comparative fault doctrine.<sup>116</sup> The court further held that determining what constitutes an inherent risk is a matter of law and that as a matter of law, being injured by Sluggerrr's hotdog toss was not an inherent risk of watching a baseball game in person.<sup>117</sup> The court differentiated between a spectator being injured by a foul ball and a spectator being injured by the actions of a team's mascot by noting that a team owner cannot completely remove the risk of being hit by a foul ball without materially changing the actual sport of baseball.<sup>118</sup> However, baseball had been played for more than 100 years without the antics of Sluggerrr or any other mascot being a part of the stadium experience.<sup>119</sup>

As the court further explained, Sluggerrr's actions were not considered an inherent risk of attending a baseball game because the hotdog launch was not a part of baseball and was only a means to entertain the fans when baseball was not being played.<sup>120</sup> The court stated that the hotdog launch was not so intertwined with the sport of baseball that the Royals could not control or limit the risk without completely abandoning the sport.<sup>121</sup> Importantly for the comparative fault determination by a jury, the court explained that there was a negligent and a non-negligent way of tossing a hotdog and that Sluggerrr could decide which toss to use.<sup>122</sup>

In its analysis, the court first had to determine whether the defense of assumption of risk survived Missouri's adoption of the comparative fault doctrine.<sup>123</sup> The doctrine of assumption of risk is summarized as follows: "[I]f a person voluntarily consents to accept the danger of a known and appreciated risk, that person may not sue another for failing to protect him from it."<sup>124</sup> The court determined that the defenses of express assumption of risk as well as implied primary assumption of risk survived Missouri's adoption

116. *Id.* at 199.

117. *Id.* at 188.

118. *Id.* at 202.

119. *Id.*

120. *Id.* at 202-03 ("Sluggerrr may make breaks in the game more fun, but Coomer and his 12,000 rain-soaked fellow spectators were not there to watch Sluggerrr toss hotdogs; they were there to watch the Royals play baseball.").

121. *Id.*

122. *Id.* at 203 ("[N]ot only is being injured by Sluggerrr's hotdog toss not an inherent risk of watching a Royals game, it is not an inherent risk of the Hotdog Launch. . . . [T]he Royals concede that there are negligent *and* non-negligent ways of tossing a hotdog and that Sluggerr[r] (for whom the Royals are responsible) can control which he uses.").

123. *Id.* at 191. Missouri adopted the comparative fault doctrine in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (en banc).

124. *Coomer*, 437 S.W.3d at 191 (citing *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982) (en banc)).

of the comparative fault doctrine, while the defense of implied secondary assumption of risk did not survive.<sup>125</sup>

The comparative fault doctrine Missouri has adopted closely resembles the Uniform Comparative Fault Act (“UCFA”).<sup>126</sup> Section 1(a) of the UCFA provides that “any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery.”<sup>127</sup> Section 1(b) “defines ‘fault’ for purposes of Section 1(a) to include unreasonable assumption of risk not constituting an enforceable express consent.”<sup>128</sup> Thus, “[w]hen a plaintiff acts unreasonably in deciding to assume a risk created by a defendant’s negligence, such ‘fault’ may reduce – but not bar – the plaintiff’s recovery under *Gustafson*.”<sup>129</sup> Using the same logic, if a claimant acted reasonably, the claimant’s decision cannot be used to diminish his recovery, as reasonable behavior does not constitute fault under *Gustafson*.<sup>130</sup>

The Supreme Court of Missouri summarized its decision by holding that “when the plaintiff is injured by the defendant’s negligence, . . . the adoption of comparative fault in *Gustafson* precludes any consideration of the plaintiff’s conduct in assuming that risk (i.e., implied secondary assumption of risk) except as a partial defense under a proper comparative fault instruction.”<sup>131</sup> As the express and implied primary applications of assumption of risk “result in determinations that the defendant has no duty to protect the plaintiff, the form of comparative fault adopted in *Gustafson* does not preclude these applications as a complete – not merely a partial – bar to the plaintiff’s recovery.”<sup>132</sup>

## V. COMMENT

The court should have ruled in favor of the Kansas City Royals for two reasons: policy and precedent. Because Missouri does not recognize different degrees of negligence,<sup>133</sup> the proper cause of action to use in holding a ballpark owner liable for injuries to spectators should be that of recklessness. In other words, if a mascot or an employee of the ballpark owner acted recklessly, causing an injury to a spectator, the owner would be liable. However, with the court’s decision, ballpark owners are now much more at risk of litigation that could result in increased ticket prices, discouraging spectators

125. *Id.* at 192-93 (“As a result, *Gustafson* rejects any further application of ‘implied secondary assumption of the risk.’”).

126. *Id.* (citing *Gustafson*, 661 S.W.2d at 18).

127. *Id.* at 192.

128. *Id.* (internal quotation marks omitted).

129. *Id.*

130. *Id.* at 192-93.

131. *Id.* at 194.

132. *Id.*

133. *Fowler v. Park Corp.*, 673 S.W.2d 749, 755 (Mo. 1984) (en banc) (“It also remains the law of Missouri that there are no legal degrees of negligence.”).

from attending games and forcing ballpark owners from taking part in “fun” interactions with fans. These activities have become part of the total in-game experience of attending a baseball game. The tradition of fan interaction could become a thing of the past.<sup>134</sup> Spectators have come to expect fan interactions, coupled with the entertainment of the game, when attending professional sporting events in person.

*A. Policy: This Decision Will Harm MLB Teams, and, in Turn, MLB Fans*

All of those events that ballpark owners have created to add to the ballpark in-game experience should be included under the protections of the baseball rule. One could argue that the definition of an inherent risk of attending a baseball game in person differs from the Supreme Court of Missouri’s definition. The inherent risks of attending a baseball game in person consist of not only “some feature or aspect of the game which is inevitable or unavoidable in the actual playing of the game,”<sup>135</sup> but also, citing Webster’s Dictionary definition of inherent, all of those things that are “structural or involved in the constitution or essential character of something: belonging by nature or *settled habit*.”<sup>136</sup> It can be argued that the different fan interactions that ballpark owners have developed, such as Sluggerrr’s hotdog launch, have become as much a part of the fan experience as catching a foul ball. These fan interactions belong by settled habit, as teams rely on these events to boost attendance by exciting fans during the downtime of baseball games. Fans have become accustomed to these fan interactions and eliminating or significantly marginalizing these events could decrease fan attendance.

In 2013, the *Wall Street Journal* calculated that the average fan attending a MLB game would see 17 minutes and 58 seconds worth of actual “action” during the three-hour average MLB game.<sup>137</sup> Therefore, the average fan is guaranteed to see “a bunch of grown men standing in a field, doing absolutely nothing” for around two hours and forty minutes during an average MLB game.<sup>138</sup> The MLB has recognized this problem and the MLB’s “Pace

134. Mark Chenoweth, *Swing and a Miss: Missouri Supreme Court Rules Against Hot Dog Toss at Ballgames*, FORBES (July 30, 2014, 9:00 AM), <http://www.forbes.com/sites/wlf/2014/07/30/a-swing-and-a-miss-by-the-missouri-supreme-court/>.

135. *Coomer*, 437 S.W.3d at 198 (citing *Lowe v. Cal. League of Prof. Baseball*, 65 Cal. Rptr. 2d 105, 111 (Cal. Ct. App. 1997)).

136. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1163 (1966) (emphasis added).

137. Steve Moyer, *In America’s Pastime, Baseball Players Pass A Lot of Time*, WALL ST. J. (July 16, 2013, 10:52 AM), <http://online.wsj.com/news/articles/SB10001424127887323740804578597932341903720>.

138. *Id.*

of Game Committee” has developed six new initiatives to speed up the game of baseball.<sup>139</sup>

So what do fans do during the other 90% of the game they paid good money to see? Teams have tried to convince fans to leave their couch, where they can view multiple games at once and have access to instant replays, and attend the games in real life instead. Not only do ballpark owners compete with television, they compete with each other. Teams are constantly trying to create new ballpark foods and beverages, provide services such as free Wi-Fi, and create new fan interactions that justify the ticket price for the attendee.<sup>140</sup> Teams are even building mini theme parks, having fireworks nights, and hosting rock concerts to draw in fans.<sup>141</sup> In *Coomer*, the hotdog launch had been a feature of every single Royals home game since 2000.<sup>142</sup> The hotdog launch was created to excite the fans as well as to provide free hotdogs to fans near Sluggerrr.<sup>143</sup>

For an example of a fan’s experience at a baseball game, the most popular food that fans consume at games has long been the hotdog.<sup>144</sup> Chris Bigelow, a consultant to stadium concessionaries, said: “It must be a Pavlovian response: you come to a ballpark, you have to have a hotdog.”<sup>145</sup> Most hotdog historians agree that hotdogs were introduced to baseball around 1895.<sup>146</sup> Since then, and despite teams introducing items such as sushi stands, steak restaurants, and other catered food, hotdogs have been considered the “king” of ballpark foods.<sup>147</sup> To some, the hot dog “is the highlight of coming to the stadium.”<sup>148</sup> Teams like the Royals know that some fans come to the games solely for the ballpark food and other fan interactions. To further incentivize leaving their home, the teams will create events that the at-

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139. Paul Hagen, *Pace of Game Initiatives to be Tested at AFL, MLB* (Oct. 1, 2014), <http://m.mlb.com/news/article/97181194/pace-of-game-initiatives-to-be-tested-at-afl>. As the title states, these initiatives will be tested in the minor leagues first. *Id.*

140. *Hot Dog Lawsuit May Affect Fan Experience*, USA TODAY (Nov. 1, 2013, 1:08 PM), <http://www.usatoday.com/story/sports/mlb/royals/2013/11/01/hot-dog-lawsuit-may-affect-fan-experience/3349921/> (“From mascot races and T-shirt cannons to free Wi-Fi and stadium sushi stands, teams have been doing everything they can to convince fans that the live experience is worth the high ticket and concession prices and is better than watching games on television.”).

141. Mark Koba, *Keeping Fans in the Stands Is Getting Harder To Do*, YAHOO SPORTS (July 7, 2013, 9:09 PM), <http://sports.yahoo.com/news/nba--keeping-fans-in-the-stands-is-getting-harder-to-do-005355696.html>.

142. *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 188 (Mo. 2014) (en banc).

143. *Id.*

144. Ken Belson, *Forget the Spicy Tuna Rolls; Most Fans Still Want a Dog*, N.Y. TIMES (July 12, 2010), <http://www.nytimes.com/2010/07/13/sports/baseball/13hot-dogs.html>.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*



tendees desire, not only to create the possibility of receiving a free hotdog or snack, but also to create excitement in an otherwise dull moment when there is no action on the diamond.<sup>149</sup> Fans purchasing a ticket to an MLB game are purchasing a ticket for those activities that come with the total in-game experience.

Between-inning antics by mascots, as well as other interactions such as shooting T-shirts or throwing hotdogs, are part of the experience of witnessing an MLB game in person. The ruling in *Coomer* has the potential to severely limit the entertainment provided by ballpark owners when the game is not being played. “With this ruling, the message now has been sent to all mascots and teams that they may be liable for any injuries fans suffer because of their actions at games.”<sup>150</sup> Ballpark owners have two major options under *Coomer*: eliminate any activities with fans that may produce negligent injuries, which will reduce some of the “fun” of attending a game in person, or completely stop fan interactions by the mascot or other ballpark employees.<sup>151</sup> A minor change that ballpark owners could choose would be to train mascots and ballpark employees to not act negligently, such as to only throw hotdogs to fans who are looking. Ballpark owners could also just decide to simply pay for these judgments as they occur without making changes. Regardless of how ballpark owners respond, *Coomer* incentivizes ballpark owners to reduce or eliminate fan interactions with ballpark employees or mascots.

The *Coomer* court misconstrued what fans expect when they attend an MLB game. The court stated: “Sluggerrr may make breaks in the game more fun, but Coomer and his 12,000 rain-soaked fellow spectators were not there to watch Sluggerrr toss hotdogs; they were there to watch the Royals play baseball.”<sup>152</sup> The court took a very narrow approach to why spectators attend baseball games in person. The court’s assumption does not account for the possibility that some fans attend games not only to witness the game of baseball, but also for the total in-stadium experience of attending an MLB game. MLB spectators not only desire fan interaction, but they *expect* fan interaction for the price of admission, rather than just attending the stadium to simply watch the game. If fans decide that the cost of attendance to an MLB game without fan interaction is too high, then fans will simply choose to stay at home, where they can watch the same baseball game and save their money.

Another policy argument against the *Coomer* decision is that the law protects ballpark owners from liability from flying bats, balls, and even play-

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149. Garrett R. Broshuis, *Death to the Crazy Hot Dog Vendor?: The Continued Erosion of the Baseball Rule After Coomer v. Kansas City Royals*, SPORTSLAW.ORG, [https://www.sportslaw.org/docs/Continued\\_Erosion\\_of\\_the\\_Baseball\\_Rule.pdf](https://www.sportslaw.org/docs/Continued_Erosion_of_the_Baseball_Rule.pdf).

150. Joshua Winneker & David Gargone, *At Sporting Events, Beware the T-Shirts Cannon*, PENNLIVE (July 27, 2014, 1:00 PM), [http://www.pennlive.com/opinion/2014/06/at\\_sporting\\_events\\_beware\\_the.html](http://www.pennlive.com/opinion/2014/06/at_sporting_events_beware_the.html).

151. *Id.*

152. *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 203 (Mo. 2014) (en banc).

ers injuring spectators, but that a flying hotdog is not protected.<sup>153</sup> The court assumes that fans are on alert from the inherent risks of the actual sport of baseball, but that they are not alert of their surroundings at other times.<sup>154</sup> This “defies logic and common sense.”<sup>155</sup> This lawsuit is “an example of continuing growth in lawsuits that tend to strip away whimsical fun and reduce everything to sterile ‘safe’ entertainment.”<sup>156</sup>

The *Coomer* court has opened the floodgates of litigation for professional sports teams in Missouri by attendees injured by mascots or employees of ballpark owners. Litigation is very expensive, and to compensate, teams will likely increase ticket prices to combat litigation costs. Thus, litigation hurts both the ballpark owner as well as the average spectator. In the alternative, park owners could cease fan interactions that could lead to negligent injury, reducing the reasons why a fan would want to attend a game in person. Yet, many spectators buy a ticket not only for the sport but also for all the in-stadium activities that accompany the game. Eliminating fan interaction hurts both the ballpark owners and the spectators. The *Coomer* decision will impact not only Missouri’s two MLB teams, but also minor league baseball teams and potentially other professional sporting events such as National Hockey League games.

### B. Precedent

Had the court adopted a broader view of the definition of the “inherent risks” of attending an MLB game in person, existing case law would not conflict with it. For instance, if the court had held that spectators assume the risk of not only the inherent dangers of baseball, but also of potentially negligent fan interactions by mascots and ballpark employees, then there would be much greater protections for ballpark owners. This protection benefits ballpark owners as well as the average fan. Had the court extended the protections of the baseball rule to mascot antics for MLB teams, the ruling would not conflict with Missouri case law. It can also be argued that *Lowe*, the persuasive authority from California on which the *Coomer* court relied, represents reckless conduct, and not merely negligent conduct.<sup>157</sup>

In *Hudson*,<sup>158</sup> a spectator who thought he was in a seat protected from foul balls was subsequently hit by a foul ball.<sup>159</sup> Mr. Hudson had attended many games before and had full knowledge of the dangers that attending a

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153. Chenoweth, *supra* note 134.

154. *Id.*

155. *Id.*

156. Logan Penza, *Missouri Baseball Fans Can Sue Mascot for Negligence*, MODERATE VOICE (July 7, 2014), <http://themoderatevoice.com/196569/missouri-baseball-fans-can-sue-mascot-for-negligence/>.

157. See *supra* notes 104-110 and accompanying text.

158. See *supra* notes 85-103 and accompanying text.

159. *Hudson v. Kan. City Baseball Club, Inc.*, 164 S.W.2d 318, 319 (Mo. 1942).

baseball game in person presents.<sup>160</sup> The court, in ruling for the defendant ballpark owner, stated that Mr. Hudson “voluntarily elected to watch the game with full knowledge of the dangers incident to it and of the possibility of injury to himself.”<sup>161</sup> The court also held that “[o]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary.”<sup>162</sup>

In 1942, when Hudson was decided, there were no mascots for any MLB teams.<sup>163</sup> Thus, there were no T-shirt cannons or hotdog launches, only baseball. *Hudson*, then, protected ballpark owners from almost all negligence that may have occurred in their stadium by their employees, as only the sport of baseball was transpiring while spectators were in the ballpark.<sup>164</sup> There was no differentiation between the inherent risks of the sport of baseball and the inherent risks of attending a game in person because the risks were the same. Using the court’s logic in *Hudson* – that one accepts the inherent dangers of attending a game of baseball as long as they were obvious and necessary – means that in contemporary terms, one accepts the inherent dangers posed by fan interactions by mascots and ballpark employees as long as they are obvious and necessary.

The hotdog launch is an obvious inherent danger of attending an MLB game for two reasons. It is obvious because it has been a constant of Royals home games since 2000, and because the hotdog launch occurs between innings, when no baseball is being played.<sup>165</sup> Fans stand and shout in excitement for Sluggerrr to throw or launch a free hotdog to them.<sup>166</sup> Not only is there no baseball being played, but also fans in the general area must impliedly give other fans notice that some event is happening near them. The hotdog launch may not be considered necessary in that is not *absolutely* needed for

160. *Id.* at 324. Mr. Coomer also had attended many baseball games and had full knowledge of the dangers the sport presents for spectators. *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 189 (Mo. 2014) (en banc).

161. *Hudson*, 164 S.W.2d at 319.

162. *Id.* at 323 (quoting *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929)).

163. Kevin Wells, *The 35 Official Mascots of Major League Baseball Teams*, COMMUNITIES DIGITAL NEWS (Apr. 9, 2014), <http://www.commdiginews.com/sports/the-35-official-mascots-of-major-league-baseball-teams-14119/>. Mr. Met, the New York Mets’ official mascot, was the first MLB mascot and was introduced in 1964. *Id.*

164. The obvious exception would be structural issues, such as if the upper deck was negligently maintained and fell on spectators. Another exception could be serving spoiled foods. See Paula Lavigne, *Bugs, Mold on Menu at K.C. Stadiums*, ESPN (Nov. 14, 2014, 11:27 AM), [http://espn.go.com/espn/otl/story/\\_/id/11854523/critical-food-safety-violations-kansas-city-pro-stadiums](http://espn.go.com/espn/otl/story/_/id/11854523/critical-food-safety-violations-kansas-city-pro-stadiums).

165. *Coomer*, 437 S.W.3d at 188.

166. *Coomer v. Kan. City Royals Baseball Corp.*, Nos. WD 73984, WD 74040, 2013 WL 150838, at \*1 (Mo. Ct. App. 2013), *transferred*, 437 S.W.3d 184 (Mo. 2014) (en banc) (“[P]eople behind [Mr. Coomer] were cheering and yelling for [Sluggerrr] to throw hot dogs to them.”).

the sport of baseball, but it may be considered necessary in that it represents needed fan interactions that fans pay for when they attend MLB games. Spectators expect more than just the sport of baseball when they attend a game in person.

In *Anderson*, decided in 1950, the court held that no negligence is found “where a baseball game is being conducted under the customary and usual conditions prevailing in baseball parks” and that the circumstances pleaded in that case did not “impose upon the defendant a duty to warn . . . against hazards which are necessarily incident to baseball and are perfectly obvious to a person in possession of his faculties.”<sup>167</sup> In 1950, there were still no mascots for MLB teams.<sup>168</sup> Thus, the statement “inherent dangers of the sport of baseball” in 1950 is the same as the statement “inherent dangers of attending a baseball game” in general today.

Today, the use of a mascot in the MLB is quite customary and is a usual feature of baseball parks across the United States. Only three teams in the MLB do not have a mascot.<sup>169</sup> The use of a mascot is a practice that is necessary to attract fans to baseball stadiums. The antics of such mascots, unless performed recklessly, should be perfectly obvious to a person in possession of his faculties. These events are so obvious that “[i]t would . . . [be] absurd, and no doubt . . . resented by many patrons, if the ticket seller, or other employees, . . . warned each person entering the park that he or she would be imperiled by”<sup>170</sup> the actions of such mascots. This is true because most mascot events, like the hotdog launch, are conducted between innings or when there is no baseball being played on the diamond.

An example of a mascot acting recklessly and thus causing an incident ripe for litigation is in *Lowe v. California League of Prof. Baseball*.<sup>171</sup> It can be argued that the mascot in *Lowe* acted recklessly, or acted in reckless disregard of the safety of another, and satisfied the definition espoused by the Supreme Court of Missouri. The court stated that recklessness occurs when a defendant “intentionally does an act or fails to do an act which it is his duty to the other to do” while “knowing or having reason to know of facts which would lead a reasonable man to realize that the actor’s conduct not only cre-

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167. *Anderson v. Kan. City Baseball Club*, 231 S.W.2d 170, 172 (Mo. 1950); see *supra* notes 94-102 and accompanying text.

168. Wells, *supra* note 163.

169. *Id.* Only the Dodgers, Angels, and Yankees do not have a mascot in the MLB. *Id.*

170. *Anderson*, 231 S.W.2d at 173. The original quote is “[i]t would have been absurd, and no doubt . . . resented by many patrons, if the ticket seller, or other employees, had warned each person entering the park that he or she would be imperiled by vagrant baseballs in unscreened areas.” *Keys v. Alamo City Baseball Co.*, 150 S.W.2d 368, 371 (Tex. Civ. App. 1941).

171. 65 Cal. Rptr. 2d 105 (Cal. Dist. Ct. App. 1997).

ates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.”<sup>172</sup>

In *Lowe*, the mascot “Tremor,” a seven-foot-tall dinosaur with a tail, repeatedly hit a fan with his tail mid-game, which caused the fan to be distracted and subsequently hit by a foul ball.<sup>173</sup> Tremor’s tail hit Mr. Lowe in the back of the head and shoulders for nearly two minutes during the game before Mr. Lowe turned around to watch the mascot’s antics.<sup>174</sup> A reasonable person, even a reasonable person acting as a mascot, should realize that there is an increase of an unreasonable risk of bodily harm from a seven-foot tall mascot acting in a way that distracts fans mid-game from the already dangerous sport of baseball. Clearly, the mascot in *Lowe* substantially increased the likelihood of substantial harm for spectators by distracting spectators mid-game.

Attending a baseball game in person is more than simply watching the baseball game. It is a “full-scale entertainment experience.”<sup>175</sup> Baseball fans assume the risk for not only the dangers of the sport of baseball, but for all of those in-stadium events that occur at the ballpark. Common sense presumes that if a spectator is on alert for the dangers of the sport of baseball, that spectator is on alert for a hand-tossed hotdog.

## VI. CONCLUSION

For the foregoing reasons, the Supreme Court of Missouri should have ruled in favor of the Kansas City Royals. Instead of protecting the MLB teams in Missouri, the court declined to extend the protections of the baseball rule for the actions of mascots and employees of ballpark owners. To compensate for potential litigation, teams will be forced to either increase ticket prices or eliminate the interactions that draw some fans attend the games. The court chose the narrow view that “inherent risks” of baseball are strictly confined to only the risks of the sport of baseball itself, rather than the broader view that “inherent risks” of attending a baseball game include all those in-game experiences that a spectator may witness while at a game. Further litigation will reveal whether *Coomer* will impact minor league baseball games as well as other sporting events, such as National Hockey League games. *Coomer* seems to be a Royal problem for ballpark owners as well as spectators.

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172. *Dilley v. Valentine*, 401 S.W.3d 544, 550-51 (Mo. Ct. App. 2013) (citing RESTATEMENT (SECOND) OF TORTS §§ 500-01 (1979)).

173. *Lowe*, 65 Cal. Rptr. 2d at 109.

174. *Id.*

175. *Chenoweth*, *supra* note 134.